

United States District Court
Eastern District of California

Cedric Woods,

Plaintiff,

vs.

D. L. Runnels, et al.,

Defendants.

No. Civ. S 03-1976 GEB PAN P

Findings and Recommendations

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Plaintiff is a prisoner proceeding pro se and in forma pauperis on his claim defendants P. Zills and M. Jimenez violated his rights by failing to prevent an attack by white prisoners on black prisoners despite a prisoner had notified defendant Zills an attack was imminent. Defendant Jimenez¹ moves to dismiss upon the ground plaintiff failed to exhaust available administrative remedies.

On a motion to dismiss for failure to exhaust available

¹ Defendant Zills had not been served with process when defendant Jimenez filed this motion.

1 administrative remedies the court may look beyond the pleadings
2 and decide disputed facts. Wyatt v. Terhune, 315 F.3d 1108 (9th
3 Cir. 2002).

4 42 U.S.C. § 1997e(a) provides that a prisoner may bring no §
5 1983 action until he has exhausted such administrative
6 remedies as are available. The requirement is mandatory. Booth
7 v. Churner, 532 U.S. 731, 741 (2001). The administrative remedy
8 must be exhausted before suit is brought and a prisoner is not
9 entitled to a stay of judicial proceedings in order to exhaust.
10 McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). Where a
11 litigant requests leave to proceed in forma pauperis, suit
12 commences when the request is granted. See 28 U.S.C.
13 § 1915(a)(1) (court may "authorize commencement" of suit without
14 prepayment of filing fee for person demonstrating inability to
15 pay).

16 California prisoners may appeal "any departmental decision,
17 action, condition, or policy which they can demonstrate as having
18 an adverse effect upon their welfare." 15 Cal. Admin. Code
19 § 3084.1(a). The regulations require the use of specific forms
20 but contain no guidelines for grievance content. 15 Cal. Admin.
21 Code §§ 3084.2, 3085 (designating use of CDC Form 602
22 Inmate/Parolee Appeal Form for all grievances except those
23 related to disabilities under the Americans with Disabilities
24 Act, which are filed on CDC Form 1824, Reasonable Modification or
25 Accommodation Request). Prisoners ordinarily must present their
26 allegations on one informal and three formal three formal levels

1 of review. 15 Cal. Admin. Code § 3084.5. While presentation on
2 the third level, the Director's Level of Review, exhausts the
3 remedy for departmental purposes, 15 Cal. Admin. Code §
4 3084.1(a), when prisoners cannot present their allegations on any
5 subsequent level, they have exhausted available remedies for
6 purposes of 42 U.S.C. § 1997e(a). Ngo v. Woodford, 403 F.3d 620,
7 625 (9th Cir. 2005). The prison's rejection of an appeal as
8 untimely does not bar a federal court from considering the merits
9 of plaintiff's claim in a civil rights action. Ngo, 403 F.3d at
10 631. Defendant has the burden of identifying the remedies that
11 remain available. Ibid.

12 Defendant Jimenez concedes plaintiff filed an appeal about
13 the June 2003 attack but asserts since the appeal was rejected as
14 untimely and plaintiff did not pursue an appeal to the director's
15 level of review, plaintiff failed to satisfy § 1997e(a).
16 Plaintiff's uncontested assertion he filed the appeal late
17 because he was too incapacitated from the attack to appeal within
18 the 15 work day limit falls neatly within the rationale of Ngo.
19 See Ngo, 403 F.3d at 631 ("As is, prison grievance procedures are
20 sufficiently difficult for prisoners to comply with. Judicial
21 imposition of the procedural default doctrine on suits brought
22 under the PLRA, coupled with the relatively short filing periods
23 for prisoner grievances, might very well preclude prisoner-
24 litigants with meritorious claims from ever bringing suit.")

25 Since plaintiff's failure timely to appeal does not bar this
26 action and defendant fails to identify any administrative remedy

1 available to plaintiff, I find plaintiff exhausted available
2 procedural remedies as required by 42 U.S.C. § 1997e(a).

3 Accordingly, defendant's October 20, 2004, motion to dismiss
4 should be denied and defendant should be directed to file and
5 serve an answer within 30 days.

6 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
7 findings and recommendations are submitted to the United States
8 District Judge assigned to this case. Within 20 days after being
9 served with these findings and recommendations, plaintiff may
10 file written objections. The document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations."
12 The district judge may accept, reject, or modify these findings
13 and recommendations in whole or in part.

14 Dated: June 2, 2005.

15 /s/ Peter A. Nowinski
16 PETER A. NOWINSKI
17 Magistrate Judge
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